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Supreme Court of the United States.

OCTOBER TERM, 1939.

No. 685.

IN THE MATTER OF

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR.

HOWARD S. PALMER ET ALL.,

Petitioners,

v.

THE COMMONWEALTH OF MASSACHUSETTS,

Respondent.

MOTION AND BRIEF FOR THE INHABITANTS OF THE TOWN OF SCITUATE FILED AS AMICUS CURIAE,

By

VERNON W. MARR, *Counsel.*

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Supreme Court of the United States.

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THE COMMONWEALTH OF MASSACHUSETTS,
Respondent.

MOTION BY THE INHABITANTS OF THE TOWN OF SCITUATE FOR PERMISSION TO FILE BRIEF AS AMICUS CURIAE.

Now come the Inhabitants of the Town of Scituate, a municipal corporation, being a political subdivision of the Commonwealth of Massachusetts, and respectfully move this Honorable Court for permission to file a brief as an amicus curiae in the above-entitled cause.

INHABITANTS OF
THE TOWN OF SCITUATE,

VERNON W. MARR,
Town Counsel.

Supreme Court of the United States.

October Term, 1939.

No. 685.

In the Matter of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor.

HOWARD S. PALMER et ali.,

Petitioners,

v.

THE COMMONWEALTH OF MASSACHUSETTS,

Respondent.

BRIEF FOR THE INHABITANTS OF THE TOWN OF SCITUATE FILED AS AMICUS CURIAE.

The Case.

The case comes before this Court upon certiorari to the Circuit Court of Appeals for the Second Circuit on the petition of Howard S. Palmer and others, Trustees in operation of the properties of the New York, New Haven and Hartford Railroad Company and of the Old Colony Railroad Company, respectively, in railroad reorganization proceedings under Section 77 of the Bankruptcy Act (11 U.S.C. 205) (R. 109). The petitioners seek to have affirmed an order of the District Court for the Connecticut District

authorizing the abandonment of passenger service at eighty-eight Massachusetts stations which was reversed on appeal by the Circuit Court of Appeals (R. 87).

The opinions in the Circuit Court of Appeals are reported *sub nom. Converse* v. *Commonwealth of Massachusetts* in 101 Fed. (2) 48. They appear in the present record at pp. 101-108. The findings and order of the District Court are not in the official reports. They appear in the record at pp. 22-27.

The Issue.

The question raised by your *amicus curiae* is whether or not the Interstate Commerce Commission should pass upon a discontinuance of the business of public carrier of passengers upon a railway line or a portion thereof before the Bankruptcy Court has authority to order termination of operation in present reorganization proceedings under the Bankruptcy Act.

The Facts (Especially Relevant to This Brief).

The Inhabitants of the Town of Scituate, otherwise known as the Town of Scituate, is a municipal corporation duly incorporated under the laws of the Commonwealth of Massachusetts, and it is a political subdivision thereof. Its interests are affected in the present cause.

(1) This Town has many year-round commuters to Boston and a very large summer population creating about three times as much passenger traffic in summer months as in January.

(2) Certain stations upon the so-called Boston and Greenbush Line of the Old Colony Railway are included in the list of stations discontinued, the existing Greenbush

terminal being in the Town of Scituate. There are three other stations still open in the Town: Scituate (Harbor), Egypt and North Scituate. Beechwood Station, which served the West End and the Beechwood section of Scituate and also part of Cohasset, is one of the abandoned stations.

(3) Relying upon the powers claimed under the Bankruptcy Laws in the present cause, the petitioner trustees of the New Haven Road, who are the trustees of the Old Colony Road, now propose discontinuance of all passenger transportation to all the Scituate stations, *i.e.*, from Hingham (17.2 miles out of Boston) down to Cohasset (21.7 miles) and Greenbush, the terminal (27.8 miles).

(4) A decision in the present cause adverse to the contentions and prayers of the respondent, Commonwealth of Massachusetts, would be adverse to the interests of the Inhabitants of the Town of Scituate. Even threatened loss of all passenger trains has injured property values and discouraged residence in this section called the South Shore. Scituate has eighteen daily trains at present (nine each way, with reduced service Saturdays and Sundays). This service is substantially the same the year round and has changed little in the past few years. In proper proceedings such extensive service may be found unprofitable and be curtailed to a reasonable extent.

(5) Labor interests everywhere are vitally concerned.

Argument.

Your *amicus curiae* respectfully submits that the petitioner trustees are relying upon an Interstate Commerce Commission ruling under which the Commission says it may decline to act; to wit: that abandonment of passenger

service while continuing freight service is not abandonment of "any portion of a line of railroad, or the operation thereof." See Interstate Commerce Act, par. (18), annexed.

This narrow construction of the Interstate Commerce Act by the Commission no doubt saves them much added work, but it does not save a railway passenger line or distinguish it from a freight line.

Steel rails and roadbeds are incidentals. Carrying passengers is the business in hand. Now the proposal is to give up that business in a large area of Southeastern Massachusetts. Where the proposals as to passenger traffic have been put into effect, this Honorable Court is virtually asked to pass upon the rights of a defunct business to exist.

The Railroad Companies themselves commonly make the distinction here made and refer frequently to passenger lines and freight lines. In the present cause they find it more convenient to apply the term "service" to their operations. Yet they propose and do cease operation of passenger lines in Southeastern Massachusetts.

Your *amicus curiae* respectfully urges that the Commission be enlightened as to its powers to prevent abandonment of a passenger line or the operation thereof, even though freight may still be hauled over the roadbed.

Conclusion.

It is respectfully submitted that the decision of the Circuit Court of Appeals for the Second Circuit should be affirmed and its mandate, hitherto stayed, issue to the District Court of Connecticut.

INHABITANTS OF
THE TOWN OF SCITUATE.
Vernon W. Mabr,
Town Counsel.

APPENDIX.

The Interstate Commerce Act, Act Feb. 1920, c. 91; 41 Stat. 474, sec. 1, as amended; 49 U.S.C.A. sec. 1:

"(17) * * * *Provided, however,* That nothing in this chapter shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the commission made under the provisions of this chapter."

"(18) * * * *abandonment of lines; certificate required.* — * * * no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

SUPREME COURT OF THE UNITED STATES.

No. 7.—October Term, 1939.

Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, Trustees, etc., Petitioners,
vs.
The Commonwealth of Massachusetts.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 6, 1939.]

Mr. Justice Frankfurter delivered the opinion of the Court.

October 23, 1935, opened another chapter in the long history of the vicissitudes of the New York, New Haven and Hartford Railroad Company.[1] By filing a petition for reorganization under § 77 of the Bankruptcy Act (47 Stat. 1474, as amended by 49 Stat. 911 and 49 Stat. 1969, 11 U. S. C. § 205), the New Haven invoked the shelter of the United States District Court for the District of Connecticut. There it has since remained. An episode in this new chapter, already four years old, is presented by this case. We brought it here, 306 U. S. 627, because it raises important questions under the railroad bankruptcy law, particularly where it intersects the regulatory systems of the states. The District Court assumed power to supplant the relevant authority of the state—an authority which, apart from proceedings under § 77, has not been conferred by Congress either upon the federal courts or the Interstate Commerce Commission. The Circuit Court of Appeals, one judge dissenting, reversed the District Court, *Converse* v. *Commonwealth*, 101 F. (2d) 48.

A summary of the facts will lay bare the legal issues. On December 28, 1937, the bankruptcy Trustees of the New Haven, acting

[1] Brandeis, "Financial Condition of the New York, New Haven and Hartford Railroad Co." (1907); *The New England Investigation*, 27 I. C. C. 560 (1913); *In re Financial Transactions of the New York, New Haven and Hartford Railroad Co.*, 31 I. C. C. 32 (1914); Report of the Joint New England Railroad Committee to the Governors of the New England States. (Storrow Report.) (1923.)

under the requirements of Massachusetts law,[2] applied to that Commonwealth's Department of Public Utilities for leave to abandon eighty-eight passenger stations.[3] Twenty one hearings were held by the Department on the questions raised by this application. During the pendency of these hearings and before the Department had taken any action, the present litigation was initiated in the New Haven bankruptcy proceedings by creditors of the debtor for an order directing the Trustees to abandon these local services. The Trustees joined in the prayer; while the Commonwealth denied the jurisdiction of the District Court and asked that the proceedings before the Department be allowed to reach fruition. The District Judge ruled that § 77 gave him the responsibility of disposing of the petition on its merits and, having taken evidence, gave the very relief for which the Trustees had applied to the Department and which was still in process of orderly consideration.

Plainly enough the District Court had no power to deal with a matter in the keeping of state authorities unless Congress gave it. And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our fed-

[2] Mass. Gen. Laws (Ter. Ed.) c. 160, § 128, provides: "A railroad corporation which has established and maintained a passenger station throughout the year for five consecutive years at any point upon its railroad shall not abandon such station . . . nor substantially diminish the accommodation furnished by the stopping of trains thereat as compared with that furnished at other stations on the same railroad, except with the written approval of the department [of Public Utilities] after notice posted in and on said station for a period of thirty days immediately preceding a public hearing thereon."

See also Mass. Gen. Laws (Ter. Ed.) c. 159, § 16, vesting general control over intrastate railway services in the Department of Public Utilities.

[3] The application also sought permission to effect certain other curtailments of passenger service. Some of the stations were situated on the lines of the New Haven, most of them on the lines of the Old Colony Railroad, and some on the lines of the Boston and Providence Railroad.

The New Haven in 1893 leased for 99 years all the properties of the Old Colony, including the Boston and Providence lines which the Old Colony had leased for 99 years in 1888. On June 1, 1936, the New Haven Trustees disaffirmed, as they were empowered to do under § 77, the Old Colony lease. After the disaffirmance the New Haven operated the lines on account of the Old Colony. On June 3, 1936, the Old Colony itself commenced proceedings under § 77. The Trustees of the New Haven were then appointed trustees for the Old Colony.

eralism and involves striking a balance between national and state authority in one of the most sensitive areas of government.

To be sure, in recent years Congress has from time to time exercised authority over purely intrastate activities of an interstate carrier when, in the judgment of Congress, an interstate carrier constituted, as a matter of economic fact, a single organism and could not effectively be regulated as to some of its interstate phases without drawing local business within the regulated sphere.[4] But such absorption of state authority is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions.[5] Therefore, in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress. *Minnesota Rate Cases*, 230 U. S. 352, *cf. Kelly* v. *Washington ex rel. Foss Co.*, 302 U. S. 1.

The dependence of local communities on local railroad services has for decades placed control over their curtailment within the regulatory authorities of the states.[6] Even when the Transportation Act in 1920 gave the Interstate Commerce Commission power to permit abandonment of local lines when the over-riding interests of interstate commerce required it, *Colorado* v. *United States*, 271 U. S. 153,[7] this was not deemed to confer upon the Commission jurisdiction over curtailments of service and partial discontinuances. *Public Convenience Application of Kansas City Southern Ry.*, 94 I. C. C. 691; see *Proposed Abandonment, Morris and*

[4] E. g., *The Shreveport Cases*, 234 U. S. 342; *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563. See I Sharfman, "The Interstate Commerce Commission", pp. 82-86, 219-225. For the careful observance of state interests in applying the Shreveport doctrine, see *Ill. Cent. R. R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493 and *Florida* v. *United States*, 282 U. S. 194.

[5] See Clark, "The Rise of a New Federalism", *passim*.

[6] The controlling Massachusetts statute has been in force since 1911. But Massachusetts has exercised control over its railroads through administrative machinery ever since the famous Adams Commission in 1869. See First Annual Report, Board of Railroad Commissioners of Massachusetts, Public Document No. 40, pp. 3-12 (1870); Hadley, "Railroad Transportation" (1885 ed.) pp. 136-139.

[7] For illustration of the scrupulous regard for local authority and local interests shown by the Commission in the exercise of its control over abandonments, see II Sharfman, "The Interstate Commerce Commission", pp. 264-269.

Essex Ry. Co., 175 I. C. C. 49. If this old and familiar power of the states was withdrawn when Congress gave district courts bankruptcy powers over railroads, we ought to find language fitting for so drastic a change.

We are asked to find it in § 77(a) granting to the bankruptcy court "exclusive jurisdiction of the debtor and its property wherever located",[8] and in § 77(c)(2) permitting the trustees, subject to the Court's control, "to operate the business of the debtor".[9] In order to expedite the reorganization of insolvent railroads, such broad and general provisions doubtless suffice to confer upon the district courts power appropriate for adjusting property rights in the railroad debtor's estate and, as to such rights, beyond that in ordinary bankruptcy proceedings. *Cf. Continental Bank etc.* v. *Rock Island Ry.*, 294 U. S. 648. But the District Court claimed power over the carrier's relation to the state. It has become the settled social policy both of the states and the nation to entrust the type of public interest here in question to expert administrative agencies because of "the notion", as Judge Learned Hand pointed out below, "that a judge is not qualified for such duties."[10]

Not only is there no specific grant of the power which the District Court exercised, but the historic background of § 77, the considerations governing Congress in its enactment, and the scheme of the legislation as disclosed by its specific provisions reject the claim. Until the amendment of March 3, 1933, railroads were outside the Bankruptcy Act.[11] But the long history of federal railroad receiverships, with the conflicts they frequently engendered between the federal courts and the public, left an enduring convic-

[8] § 77(a), 47 Stat. 1474, as amended in 1935 by 49 Stat. 911, 11 U. S. C. § 205(a) provides so far as here relevant: "If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

[9] "The trustee or trustees so appointed . . . shall have . . . subject to the control of the judge and the jurisdiction of the Commission as provided . . . the power to operate the business of the debtor." § 77(c)(2), 47 Stat. 1475, as amended by 49 Stat. 914-15, 11 U. S. C. § 205(c)(2).

[10] See *Converse* v. *Commonwealth*, 101 F. (2d) 48, at 51.

[11] See H. Rep. No. 1897, 72d Congress, 2d Session, p. 5.

tion that a railroad was not like an ordinary insolvent estate.[12] Also an insolvent railroad, it was realized, required the oversight of agencies specially charged with the public interest represented by the transportation system. Indeed, when, in the depth of the depression, legislation was deemed urgent to meet the grave crisis confronting the railroads, there was a strong sentiment in Congress to withdraw from the courts control over insolvent railroads and lodge it with the Interstate Commerce Commission.[13] Congress stopped short of this remedy. But the whole scheme of § 77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates.

The judicial process in bankruptcy proceedings under § 77 is, as it were, brigaded with the administrative process of the Commission. From the requirement of ratification by the Commission of the trustees appointed by the Court to the Commission's approval of the Court's plan of reorganization the authority of the Court is intertwined with that of the Commission.[14] Thus, in § 77(c) and

[12] See Chapter XXII "Railroad Receiverships" in I Gresham, "The Life of Walter Quintin Gresham, pp. 366-378; Jacobs "The Interstate Commerce Commission and Interstate Railroad Reorganizations", 45 Harv. L. Rev. 855; Lowenthal "The Investor Pays". See also remarks by Senator Wheeler, as Chairman of the Committee on Interstate Commerce, introducing the amendment of 1935, 79 Cong. Rec., Pt. 13, p. 13764.

[13] See 76 Cong. Rec., Pt. 5, p. 5358 (remarks of Representative LaGuardia): "I would like to see the entire reorganization taken from the courts and placed in the Interstate Commerce Commission." The suggestion for administrative receiverships originated with the late Chief Justice Taft, when Circuit Judge, in an address before the American Bar Association. Taft, "Recent Criticism of the Federal Judiciary", Reports of the American Bar Association (1895) 237, 264.

[14] § 77(c)(1) requires the appointment of trustees to be ratified by the Commission; § 77(c)(2) gives the Commission supervision over the compensation paid to trustees and their counsel; § 77(c)(3) permits the issuance of trustees' certificates only with the Commission's approval; § 77(c)(9) permits the Commission, on request of the court, to investigate facts pertaining to mismanagement of the debtor; § 77(c)(10) empowers the Commission to set up accounts for the allocation of earnings among the various portions of the debtor's lines; § 77(c)(11) empowers the Commission to file reports as to the debtor's property, prospective earnings, etc., and gives to the facts stated in such reports a presumption of correctness; § 77(c)(12) gives the Commission supervision over allowances for the expenses of various parties in interest in connection with the reorganization proceedings; §§ 77(d) and 77(e) give to the Commission control over any proposed plan of reorganization; § 77(p) gives to the Commission control over the solicitation of proxies or deposit agreements.

See also H. Rep. No. 1897, 72d Congress, 2d Session, pp. 5-6; H. Rep. No. 1283, 74th Congress, 1st Session, pp. 3-5; S. Rep. No. 1336, 74th Cong., 1st Session, pp. 4-6; Report, Federal Coordinator of Transportation, 1934, H. Doc. No. 89, 74th Cong., 1st Session, pp. 100-101; 76 Cong. Rec., Pt. 5, pp. 5108-5110; 79 Cong. Rec., Pt. 12, p. 13301, Pt. 13, pp. 13764, 13767.

§ 77 (o) the power of the district courts to permit abandonments is specifically conditioned on authorization of such abandonments by the Commission. In view of the judicial history of railroad receiverships and the extent to which § 77 made judicial action dependent on approval by the Interstate Commerce Commission, it would violate the traditional respect of Congress for local interests and for the administrative process to imply power in a single judge to disregard state law over local activities of a carrier the governance of which Congress has withheld even from the Interstate Commerce Commission, except as part of a complete plan of reorganization for an insolvent road.[15] About a fourth of the railroad mileage of the country is now in bankruptcy.[16] The petitioners ask us to say that district judges in twenty-nine states have effective power, in view of the weight which often attaches to findings at *nisi prius*, to set aside the regulatory systems of these twenty-nine states with all the consequences implied for those communities. Congress gave no such power.

Arguments of convenience against denial of the existence of this power have been strongly pressed upon us. Continuance of state control over these local passenger services will, it is urged, impair the bankruptcy court's power to formulate a reorganization plan for the approval of the Interstate Commerce Commission. Such embarrassments, due either to the time required for exhaustion of the orderly state procedure or to the financial losses that may be involved in the continuance of local services until duly terminated by the state, may easily be exaggerated. It is not without significance that after four years no reorganization plan for the New Haven has yet been evolved. Perhaps it is no less true that amenability to state laws will serve as incentive to the formulation of

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[15] "Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto . . . . the laws of any State or the decision or order of any State authority to the contrary notwithstanding." § 77 (f).

The records of the Interstate Commerce Commission disclose that eight plans of reorganization have thus far been filed with the District Court in the New Haven proceedings and transmitted to the Interstate Commerce Commission. Proceedings before the Commission had progressed to the point where an examiner's report was filed but the report was withdrawn for further hearings. The present record fails to show what, if any, disposition of the Old Colony lines any of these plans proposed to make.

[16] On October 23, 1939, there were 61,292.69 miles of railroad in bankruptcy proceedings under § 77. This mileage includes lines in 29 states.

reorganization plans which, on approval by the Commission, do supplant state authority. But, in any event, against possible inconveniences due to observance of state law we must balance the feelings of local communities, the dislocation of their habits and the over-riding of expert state agencies by a single judge sitting, as in this case, in another state, removed from familiarity with local problems, and not necessarily gifted with statesman-like imagination that transcends the wisdom of local attachments.

Other arguments, drawn from the legislative history of § 77 and from the general equity powers conferred by § 77(a) and § (77)(c),(2),[17] were urged but we deem it unnecessary to say more. The decree below is

Affirmed.

Mr. Justice BUTLER took no part in the consideration and decision of this cause.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[17] *In Re Tyler*, 149 U. S. 164, and other decisions of this Court cited by petitioners, deal with attempts at "physical invasion" of the properties held in the custody of a Federal court. See 149 U. S. at 182. § 65 of the Judicial Code (36 Stat. 1104, 28 U. S. C. § 124) decisively indicates that Congress did not intend that those who operate a business under the control of a federal court should be immune from the regulatory authority of the several states any more than they are from their taxing power.